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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Baywood Technologies, Inc.

Serial No. 76442570

Arthur G. Yeager for Baywood Technologies, Inc.

Angela M. Micheli, Trademark Examining Attorney, Law Office 108
(David E. Shallant, Managing Attorney).

Before Quinn, Walters and Holtzman, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Baywood Technologies, Inc. has appealed from the final refusal of the trademark examining attorney to register the mark shown below for "computer software for access control of visitors, vendors, personnel, and vehicle traffic for military installation areas and/or buildings in such areas, and for security information data management," in International Class 9.¹

¹ Application Serial No. 76442570, filed August 22, 2002, based on an allegation of first use and first use in commerce on November 28, 2001.



The application includes a disclaimer of "MILITARY ACCESS CONTROL SYSTEM" and a description of the mark as "a stylized representation of elements with spaced connectors forming MACS and a long horizontal element therebeneath."

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the mark MAC for the following goods as to be likely to cause confusion.²

"Access control systems, comprising a micro processor controller and magnetic-strip card readers for monitoring the security of pre-determined locations," in International Class 9.

When the refusal was made final, applicant appealed. Briefs have been filed.³ An oral hearing was not requested.

² Registration No. 1390573 issued April 22, 1986; Section 8 and 15 affidavits accepted and acknowledged, respectively.

³ The examining attorney filed her appeal brief late, on November 3, 2004, along with a motion to accept the late brief. In her motion, the examining attorney explains that although the Board's notification of the time to file her brief was dated June 17, 2004, the notice was not received by the examining attorney until September 29, 2004. Applicant has objected to the motion, requesting that the Board "enter an order favorable to applicant" and arguing that the motion was not only filed late, but it was not filed promptly after the alleged receipt of the notice. The Board, within its discretion, may permit the late filing of a brief for good cause. We find good cause in this case to allow the late filing of the examining attorney's brief. Moreover, we also

Here, as in any likelihood of confusion analysis, we look to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand, including the similarity of the marks and the relatedness of the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Applicant contends that the examining attorney has improperly dissected the marks and that the marks when considered in their entirety are not similar. Applicant argues that the disclaimed wording is still part of applicant's mark, and that this wording coupled with the "highly distinctive design and logostyle [sic] reminiscent of old army and navy barracks and signage" are sufficient to render the marks dissimilar. In addition, applicant argues that "widespread registration and uses" of the term "mac" or "macs" renders registrant's mark weak and not entitled to a broad scope of protection. In support of this contention, applicant has submitted a number of third-party registrations for these terms "in other fields," and four third-party registrations for marks in the computer hardware and

consider that the brief was filed within a reasonable time after receipt of the notice, that applicant has filed a reply brief in response thereto, and that there is no suggestion that applicant has been prejudiced by the delay. The motion is accordingly granted, and the examining attorney's appeal brief is accepted as timely. We would also point out that even if the brief were not accepted, the case would still be decided on the merits. See, e.g., *In re Tennessee Walking Horse Breeders' and Exhibitors' Association*, 223 USPQ 188 (TTAB 1984).

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software fields, two of which are owned by Apple Computer, Inc. Pointing to these two registrations, applicant argues that "Apple Computer sells its MAC computers in the marketplace and owns an incontestable registration thereof," concluding that "[i]f this doesn't prove that registrant's mark is weak, applicant does not know what other proof is necessary."

It is true that marks must be considered in their entirety. However, it is well settled that "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety." See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

When registrant's mark MAC and applicant's mark MACS MILITARY ACCESS CONTROL SYSTEM and design are compared in their entirety, giving appropriate weight to the features thereof, we find that the marks are very similar in meaning and in their overall commercial impression, and that these similarities outweigh the differences in the marks.

Registrant's entire mark is the word MAC. The virtually identical term, MACS, is visually and aurally the most significant portion of applicant's mark, and it is this portion of the mark that conveys the strongest impression. While the disclaimed and descriptive wording, "MILITARY ACCESS CONTROL

SYSTEM," is not ignored, the fact is, that the purchasing public is more likely to rely on the nondescriptive portion of the mark, "MACS," as an indication of source. We also note that the disclaimed wording also appears in much smaller lettering than "MACS" and on a separate line. In addition, it is the word "MACS," itself, rather than the particular display of that word, that is more likely to have a greater impact on purchasers and be remembered by them. The word portion of a composite word and design mark is generally accorded greater weight because it would be used to request the goods. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

As to the meaning of the marks, both "MAC" and "MACS" appear to be arbitrary terms in relation to the identified goods. In applicant's mark, the term "MACS" is clearly an acronym for "military access control system" but, like MAC in registrant's mark, the term has no intrinsic meaning in relation to the goods.

Applicant's contention that MAC is weak and entitled to only a narrow scope of protection is unsupported. There is no evidence that "MAC" is in common use. Third-party registrations are not evidence that the marks therein are in use. See *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973).

Moreover, although third-party registrations can be used to show that a commonly registered term has a suggestive or

recognized meaning in a particular field, there is no such evidence here. First, third-party registrations of "MAC" or "MACS" for goods in unrelated fields are irrelevant. Further, the existence of four third-party registrations, two of which are owned by the same entity, hardly constitutes "widespread registration" of "MAC" for computer hardware and software and fails to show any suggestive or commonly understood meaning of "MAC" in the computer field. We also note that the computer goods listed in those registrations are used for entirely different purposes than the goods in the cited registration. The evidence does not convince us that MAC is anything other than an arbitrary mark for registrant's goods, or that it is entitled to anything less than a normal scope of protection.

We turn then to a consideration of the goods. Applicant contends that the goods are not similar, arguing that its computer software is for access control specifically directed to military installations whereas registrant's goods are essentially hardware for monitoring security of predetermined areas. Applicant also contends that the channels of trade are different, reasoning that applicant's goods are for use in military installation areas and must pass GSA scrutiny, while registrant's mark is used to monitor the security of any location. In addition, applicant maintains that registrant's goods would be directed to the general public whereas applicant's software is

directed to military installations who are sophisticated purchasers.

It is well settled that goods need not be similar or competitive in nature to support a finding of likelihood of confusion. The question is not whether purchasers can differentiate the goods themselves, but rather whether purchasers are likely to confuse the source of the goods. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Thus, it is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with, the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Notwithstanding the differences in these goods, applicant's security access control software for military installations, on the one hand, and registrant's security access control systems, comprising a microprocessor controller and magnetic strip card readers for monitoring security, on the other, are inherently related goods. Applicant's software and registrant's hardware are used for the same ultimate purpose. They operate together as complementary parts of an electronic security access system.

We also note that the examining attorney has submitted several use-based, third-party registrations showing that the same mark has been registered for microprocessors and software in various specialized fields. While not evidence of use of the marks, the third-party-registrations have probative value to the extent that they suggest that the respective goods herein are of a type which may emanate from the same source.⁴ See, e.g., *In re Albert Trostel & Sons Co.*, *supra*; and *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988).

Applicant's contention that the channels of trade and purchasers for the respective goods are different is not persuasive. We must consider the issue of likelihood of confusion in the context of the identifications of goods in the respective application and registration, and in the absence of specific limitations, on the basis of all of the usual purchasers and channels of trade for the respective goods. Canadian

⁴ Applicant argues that "while some computer hardware manufacturers do list software,...most software manufacturers do not list hardware or microprocessors with their software." Applicant conducted a search of the Office electronic records showing, as described by applicant, that there are over 1700 applications and registrations for "microprocessor" that do not include software in the identification of goods, and thousands of records for software that do not include "microprocessor," but only 730 records that include both goods. There are a number of problems with applicant's contention and the evidence used to support it, not the least of which is that a search conducted in the goods and services field for the singular form of the term "microprocessor" would not have retrieved the plural form of that word or other relevant variations such as "microprocessing equipment" or "micro processors" as separate terms. In any event, this evidence, to the extent it is probative of anything, suggests that it is not uncommon for entities to adopt a single mark for both products.

Imperial Bank of Commerce v. Wells Fargo Bank, N.A., 811 F.2d 1490, 1493, 1 USPQ2d 1813 (Fed. Cir. 1987); and CBS, Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983). There are no limitations as to the channels of trade or classes of purchasers in registrant's identification of goods. Therefore, we must presume that registrant's MAC security system would be available to all types of establishments and facilities, including the military installations where applicant's goods are used, and it is reasonable to assume that the same individuals would make the purchasing decisions concerning both products.

Moreover, the fact that such purchasers would be sophisticated and knowledgeable about those products does not compel a finding that there is no likelihood of confusion. Even sophisticated persons would be susceptible to source confusion, particularly under circumstances where, as here, the goods are closely related and are sold under similar marks. See Wincharger Corp. v. Rinco, Inc., 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also In re Pellerin Milnor Corporation, 221 USPQ 558 (TTAB 1983).

Decision: The refusal to register is affirmed.